

MARY TERESA WILLS RYAN)	
(McKINNEY),)	
)	
Plaintiff/Appellee,)	Appeal No.
)	01-A-01-9512-PB-00544
v.)	
)	Davidson Probate
KEVIN B. RYAN,)	No. 90D-1521
)	
Defendant/Appellant.)	

<p>FILED</p> <p>June 26, 1996</p> <p>Cecil W. Crowson Appellate Court Clerk</p>
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COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE PROBATE COURT FOR DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

THE HONORABLE PHILLIP ROBINSON, SPECIAL JUDGE

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AFFIRMED AND REMANDED

SAMUEL L. LEWIS, JUDGE
MEMORANDUM OPINION¹

The defendant, Kevin B. Ryan ("Father"), has appealed from the trial court's order changing custody of the parties' minor child, Sabrina D. Ryan, from joint custody to the primary custody of the plaintiff, Mary Teresa Wills Ryan ("Mother").

Mother and Father married in March 1983. In June 1990, they entered into a Marital Dissolution Agreement ("MDA") and filed a complaint for divorce. The final divorce decree, entered on 6 September 1990, incorporated the MDA. Mother and Father had one minor child, Sabrina, who was four years old at the time of the divorce. The MDA provided for joint custody. Mother had Sabrina three days a week and every fourth weekend, and Father had her the remainder of the time.

Following the divorce, Mother married her current husband, Mark McKinney. Mr. McKinney's job required that the couple move to England for three years. When this occurred, Father and Mother filed an amendment to the MDA. The amendment gave Father primary custody with a three year limitation; gave Mother custody for one month in the winter, two months in the summer, and reasonable visitation any time she returned to the United States; required Mother to pay \$300.00 per month to Father for child support; and allowed for renegotiation at the end of the three years.

Three years later, Mother and Mr. McKinney learned that Mr. McKinney had to stay in England for a short time longer. As a result, Mother and Father amended the MDA a second time in December

¹Court of Appeals Rule 10(b):
The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in a subsequent unrelated case.

1993. About two weeks after entering the amendment, Mother and Mr. McKinney returned to the United States.

Despite Mother's efforts while in England to maintain contact with Sabrina and her frustration at not having the required visitation, Mother, who testified that she did so for the child's sake, did not file a petition with the court to enforce the visitation agreement. Mother knew that the assignment in England was temporary. She also knew that she would eventually return to the United States and that she could then seek custody.

In 1994, Mother and Mr. McKinney moved to California. In May 1994, Mother and Father entered into an agreed order modifying the visitation agreement. Pursuant to the order, Father was to maintain primary custody and Mother was to have summer visitation in California and reasonable visitation any time Mother was in Tennessee. Mother's child support payments were decreased from \$300.00 to \$250.00 per month. At the end of the 1994 summer visitation, Mother and Father were to renegotiate. During this time period, Mother learned of the declining circumstances of Father's living conditions. In September 1994, Mother petitioned the court for a change of custody.

Father and Mother's relationship had deteriorated severely. Both parties filed various motions, including a restraining order filed by Mother in February 1995 prohibiting Father from carrying out his threats of fleeing the jurisdiction with Sabrina. Of four visitation requests made by Mother between her move to California in 1994 and the trial of this matter in August 1995, three required Mother to go to Tennessee's courts.

Following a hearing on this matter, the trial court found:
That the Petition to Change Custody filed by the

plaintiff, MARY TERESA WILLS RYAN MCKINNEY, is well taken and the Court affirmatively finds that there has been a substantial change in circumstances and that it is in the best interest of the minor child that the custody be change[d] from joint custody with the Defendant being the primary custodian to the Plaintiff, MARY TERESA RYAN WILLS MCKINNEY, being granted custody of the minor child with the Defendant being granted...visitation rights....

The visitation rights are set forth in the court's order of 8 September 1995.

Father's only issue is "[d]oes the record contain evidence that preponderates against the special judge's conclusion that a substantial change in circumstances warrants a change of custody pursuant to section 36-6-101(a) of the Tennessee Code."

The review of a trial court's findings of fact in a civil action shall be de novo upon the record accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d). This presumption applies in child custody cases. **Hass v. Knighton**, 676 S.W.2d 554, 555 (Tenn. 1984).

In cases tried without a jury, the question of witness credibility is within the exclusive province of the trial judge. **Scarborough v. Scarborough**, 752 S.W.2d 94, 96 (Tenn. App. 1988). This court will not reverse a trial court's decision which relies on witness credibility unless, absent oral testimony, the record contains clear, concrete, and convincing evidence to the contrary. **Airline Constr., Inc. v. Barr**, 807 S.W.2d 247, 264 (Tenn. App. 1990).

In this case, the trial court heard detailed testimony from several witnesses who testified on behalf of both Father and Mother. The court considered all the evidence and found that there

was a change in circumstances sufficient to warrant a modification of custody.

Father has offered no clear, concrete, and convincing evidence to the contrary. There was evidence that, for the past few years, the financial and physical conditions under which the minor child lived while in Father's custody were not in the child's best interest. Father's financial situation deteriorated to the extent that he was forced to seek public assistance and to declare bankruptcy. The evidence showed that Father's mobile home was unsuitable because it had fallen into a state of disrepair and was filthy. The evidence also established that Sabrina had been in an unhealthy state while in Father's custody. For the past five years that he has had custody, Father allowed Sabrina to sleep in the same bed with him, but he denied allowing her to sleep under the covers. There is a video tape in the record, however, that shows her sleeping under the covers. There was also evidence that Father's behavior was unsuitable and was not in Sabrina's best interest. He brought various girlfriends to his mobile home and, on at least one occasion, made video tapes of him and his girlfriend having sex. Thinking he had erased the tape, Father filmed Sabrina and distributed the tape to the family. Unfortunately, the tape still contained footage of he and his girlfriend having sex.

We are in agreement with the trial court that the evidence established a material change of circumstances which allowed the court to award primary custody of Sabrina to Mother with visitation to Father. The record established that the couple originally had a joint custody arrangement, but that it had become unworkable. "The unworkability of joint custody because of the recalcitrance of one or both parents is not a change of circumstances anticipated in the former decree. Such is therefore a proper ground for re-

evaluating the custody arrangement in the former decree." *Dalton v. Dalton*, 858 S.W.2d 324, 326 (Tenn. App. 1993). The evidence showed that Father consistently refused to comply with visitation agreements set forth in prior court orders. Our courts have also recognized that changed circumstances include any material change of circumstances affecting the welfare of the child which the former decree could not anticipate. *Hicks v. Hicks*, 26 Tenn. App. 641, 647, 176 S.W.2d 371, 374 (1943). The record established that Mother had no means to anticipate the decline in Father's living conditions, behavior, or lifestyle when she consented to Father having primary custody of Sabrina.

Mother also questions "[w]hether the child support awards are proper." The child support guidelines provide courts with a rebuttable presumption as to the correct amount of monthly child support. Tenn. Code Ann. § 36-5-101(e)(1)(Supp. 1995). Courts may deviate from the guidelines, but when doing so, they must make "written findings that the application of the child support guidelines would be unjust or inappropriate" *Id.* Here, the court found that the guidelines required Father to pay approximately \$350.00 per month. The court stated, however, that it deviated from the guidelines and ordered Father to pay \$300.00 per month. After reviewing the record, we are of the opinion that there is ample evidence to support the deviation from the guidelines. This issue is without merit.

Mother has asked that she be awarded attorney's fees pursuant to Tennessee Code Annotated section 36-5-103(c). We considered this request and find it to be without merit under the circumstances of this case. We are also of the opinion that Mother's request for damages for a frivolous appeal are without merit.

Therefore, it results that the judgment of the trial court is in all things affirmed, and the cause is remanded for any further necessary proceedings. Costs on appeal are taxed to the defendant/appellant, Kevin B. Ryan.

SAMUEL L. LEWIS, JUDGE

CONCUR:

HENRY F. TODD, P.J., M.S.

BEN H. CANTRELL, J.